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No. 02-575

Supreme Court, U.S.
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In The

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Nike, Inc., *et al.* Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion and assembly. For example, MSLF was a party in *Mountain States Legal*

[1] Counsel for Nike, Inc., *et al.*, have filed a "blanket" consent for the filing of *amici* with the Clerk of the Court and a copy of counsel for Kasky's consent to this brief has been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part, and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

Foundation v. Colorado, 946 P.2d 586 (Col. App 1997), counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), and filed an *amicus* in *Mulder v. National Labor Relations Bd.*, ___ U.S. ___, 123 S.Ct. 551 (Mem.) (2002). MSLF believes that its expertise in the area of First Amendment constitutional guarantees will assist this Court.

I. BACKGROUND

It is said among law professors that "hard cases make bad law." More accurately in this case, it could be said that "bad precedent makes for impossible decisions" speaking, of course, about the impossible, artificial, and arbitrary separation of commercial from non-commercial speech that has emerged as apparently dispositive in this case.

Of course, it has been this Court's view that the "First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire." *New York Times Co. v. U.S.*, 403 U.S. 713, 749 (1971), referring to Justice Holmes' opinion in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Justice Holmes and the First Amendment might have fared better had he been in a position to take a lesson from Rothbard, however, who wrote "the problem here is *not* that rights cannot be pushed too far, but that the whole case is discussed in terms of a vague and woolly 'freedom of speech' rather

than in terms of the rights of private property."[2] As Rothbard points out in *For A New Liberty*:

> The fellow who brings on a riot by falsely shouting "fire" in a crowded theater is, necessarily, either the owner of the theater (or the owner's agent), [or] a paying patron, [or a trespasser]. If he is the owner, then he has committed fraud on his customers. . . . Suppose, on the other hand, that the shouter is a patron and not the owner. In that case, he is violating the property right of the owner as well as the other guests to their paid-for performance. As a guest, he has gained access to the property on certain terms, including an obligation not to violate the owner's property or to disrupt the performance the owner is putting on. . . . The fellow who maliciously yelled fire in a crowded theater is indeed a criminal but not because his so-called "right of free speech" must be pragmatically restricted on behalf of the "public good"; he is a criminal because he has clearly and obviously violated the property rights of another person.[3]

In the wake of Justice Holmes' regrettable theater analogy and its unfortunate blow to individual liberty and property rights, a persistent chipping away at the "absoluteness" of the First Amendment has ensued in the name of various criminal and commercial justifications despite the absolute nature of the Amendment's language: "Congress shall pass no law . . . abridging freedom of speech, or

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[2] Murray N. Rothbard, *For A New Liberty* 43 (rev. ed. 1978).

[3] *Id.* at 43-44.

of the press; of the right to peaceably assemble, and to petition the Government for a redress of grievances.'"[4]

It was, of course, not contemplated that such an absolute limitation on the power of the federal government over speech would have much relevance in the criminal law arena because, aside from the three constitutional crimes of treason (from which anti-sedition laws admittedly sprung), piracy on the high seas, and counterfeiting, such regulation was reserved expressly to the states, *inter alia*, by way of the Tenth Amendment and by the system of federalism recently discussed by Chief Justice Rehnquist.[5]

Neither was it contemplated that tying the hands of Congress in the area of speech would significantly impact commerce-related speech given that the federal government's role in commerce was limited to the express role of regulating foreign commerce and the Commerce Clause was still properly understood to be a limitation on discriminatory practices by a State favoring the economic activities of its citizens over the economic activities of citizens of neighboring states.[6] It was not until 1942 that

[4] U.S. Const. amend. I.

[5] In his 1998 Year-End Report on the Judiciary, Chief Justice William H. Rehnquist said the trend to federalize crimes traditionally handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.

[6] "The statute was held not to violate the commerce clause of the constitution of the United States, because it made no discrimination

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this Court gave Congress such "authority" as to exercise dominion and control over an Ohio wheat farmer who wanted little more than to feed wheat grown on his own property to the chickens with which he shared the land[7] and has now become the means by which the federal government interferes in some way with virtually every economic transaction.

Over time, more exceptions to the seemingly absolute language in the First Amendment have been accepted and, ironically, it was in the same year as the *Wickard v. Filburn*[8] decision that this Court decided *Valentine v. Chrestenson*, 316 U.S. 52 (1942), excluding, at least temporarily, all so-called "commercial speech" from First Amendment protection. As a consequence, the Court finds itself in what now appears to be a seemingly unending series of *ad hoc* decisions[9] in its attempts to apply various

between residents or products of the state and those of other states." *Schollenberg v. Com. of Pa.*, 171 U.S. 1 (1898). *See also*, "In the case of *Gibbons v. Ogden*, (9 *Wheat. Rep.* 194.) the Court, in speaking of the grant of the power of Congress to regulate commerce, say[s], 'It is not intended to comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to, or affect other States; such a power would be inconvenient, and is certainly unnecessary. The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description." *Brown v. Maryland*, 25 U.S. 419, 452 (1827) (Thompson, J., dissenting).

[7] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[8] *Id.*

[9] Terry Eastland, *Freedom of Expression in the Supreme Court* xxvi (2001) ("In deciding First Amendment claims, the Court has not employed a single mode of analysis. Instead it has used a variety of

(Continued on following page)

philosophically-impossible standards derived from a history of decisions separating speech into artificial and arbitrary categories of commercial and non-commercial speech and is now again presented with a case for which application of this impossible standard is apparently controlling in what should have been little more than a state law fraud case (if even that).

II. DISPARATE SCRUTINY OF "COMMERCIAL" AND "NON-COMMERCIAL" SPEECH IS IMPOSSIBLE BECAUSE OF "INTERMINGLING" AND "INSEPARABILITY OF END AND MEANS."

A. The Intermingling Problem

Much as group rights are untenable (because at any time an individual can belong to more than one group),[10] so too are artificial categories of commercial and

legal concepts and tests, revising or discarding them as new cases arise.")

[10] Ludwig Von Mises, *Human Action* 42-43 (3rd Rev. Ed. 1966) ("All actions are performed by individuals. A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action, that determines its character. The hangman, not the state, executes a criminal. . . . For a social collective has no existence and reality outside of the individual member's actions. The life of a collective is [only] lived in the actions of the individuals constituting its body. Those who want to start the study of human action from the collective unity encounter an insurmountable obstacle in the fact that an individual at the same time can belong and – with the exception of the most primitive tribesman – really belongs to various collective entities.").

non-commercial speech. Seldom is speech wholly one or the other. Nevertheless, this Court relied upon these classifications in deciding *Valentine v. Chrestensen*, 316 U.S. 52 (1942), a decision in which this Court upheld a provision of New York City Sanitary Code prohibiting distribution of commercial and business advertising matter in public streets. Such classification was created even though the facts in *Valentine* highlighted, in a most profound way, the quickly-recognized, inevitable, and impossible problem of separating commercial from non-commercial speech.

In *Valentine*, after purchasing a used submarine from the U.S. Navy, Mr. Chrestensen transported his submarine to New York City for exhibition purposes and began distributing handbills advertising submarine tours for which he was made aware subsequently that he was violating the sanitary code. Because the code exempted political speech and petitions from its prohibition, Chrestensen returned his handbills to the printer and, in an effort to escape the provisions of the ordinance, commissioned the printer to also print on the reverse of his handbills, a "political protest" against the city dock department, which had earlier refused his application for wharfage facilities at the city pier of his preference. While a genuine political protest, the submarine owner admitted to printing his protest on the reverse side of the handbill for the sole purpose of strengthening his case. The New York City police, nevertheless, cited Chrestensen. Moreover, in its decision, this Court saw fit to simply exempt all "commercial speech" from the protection of the First Amendment and upheld the New York "Sanitary" Code.

"For more than 30 years this 'casual, almost offhand' statement in *Chrestensen* . . . operated to exclude commercial speech from the protection afforded by the First Amendment to other types of communication." *Virginia State Board of Pharmacy, et al. v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 776 (1976). This casual offhand categorization which, as Justice Douglas, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, observed: 'The ruling was casual, almost offhand. And it has not survived reflection." *Cammaran v. U.S.*, 358 U.S. 498, 514 (1959) (concurring opinion). Justice Brennan, joined by Justices Stewart, Marshall, and Powell, also commented: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n. 6 (1974) (dissenting opinion).

Subsequent to *Valentine*, this Court has attempted to apply an ever-evolving "commercial speech" standard. To cope with Tupperware sellers on New York campuses in Board of Trustees of the *State of New York University v. Fox*, 492 U.S. 469 (1989), the Court ruled that speech involved in product demonstrations in campus dormitory rooms was "commercial speech," for purposes of First Amendment analysis, even though the sellers also touched upon other subjects. In this case, a corporation and students brought action seeking declaratory and injunctive relief against the board of trustees of a state university system based upon the refusal of university officials to permit the corporation to conduct product demonstrations in campus dormitory rooms. Of course, Tupperware sellers, in an attempt to qualify for higher speech protection, argued that much more than the mere selling of

plastic items was taking place, "such as how to be financially responsible and run an efficient home." *Id.* at 469.

Not surprisingly, the impossibility of maintaining such an arbitrary scheme of separating commercial from non-commercial speech again became apparent when, not many years later, the issue of "intermingling" arose again in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). This Court, though expressly overturned by *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), attempted to apply some *Valentine* remnants in *City of Cincinnati,* as it struggled to decide at what point a newspaper that contains mostly advertisements constitutes commercial speech subject to less judicial scrutiny. But analysis of any such continuum requires either an arbitrary line at which a publication is deemed commercial or non-commercial, a multitude of standards for a multitude of commercial and non-commercial percentage or, in the alternative, arbitrary over- and under-inclusive categorizations.

One must ask, however, where the limits of such categorization ends. It must, at a minimum, be acknowledged that the *Denver Post*, the *New York Times*, and CBS also exist if not for the purpose of selling advertising, at least with a profit-making motive. Should we now expose the editorials in the "mainstream" papers and networks to a lesser degree of scrutiny because, like Mr. Chrestensen's submarine flyers, the commentaries come packaged or intermingled with automobile advertisements of one form or another.

B. Ends/Means Problems

Another serious problem exists with the practice of separating speech into commercial and non-commercial categories. That is, the *ends* and *means* for any given communication are only subjectively known and, thus, it is not possible to know whether a *means* that appears to be "commercial" is actually serving a political *end* or a *means* that appears to be political, is actually purely "commercial." Free speech and its protection often serves as a tool or means of achieving political ends that, in turn, only serve to attain purely economic or commercial benefits.

As for political versus "commercial" speech, it was Barber Conable, former U.S. House Member and World Bank President who was quoted as saying, "Hell hath no fury like a vested interest masquerading as a moral principle." Case in point: Lobbyists spend over $100 million per month in order to influence the U.S. Congress.[11] During a campaign finance reform debate, Congressman Ron Paul of Texas explained this degree of lobbyist spending saying, "[g]overnment has tremendous influence over the economy through interest rate controls, contracts, regulations, loans and grants . . . [e]qualizing 'competition' and balancing powers such as between labor and business is a common practice. As long as this system remains in place, the incentive to buy influence will continue."[12] The question, then, is whether buying

[11] Cong. Rec. H4,214-15 (daily ed. June 14, 1999) (Statement of Cong. Paul).

[12] *Id.*

influence in this manner constitutes a "commercial transaction" and is, thus, "commercial" speech.

To some extent, this Court has attempted to wrestle with that preceding question within the ambit of antitrust law. Setting aside, for the purpose of this *amicus* brief, the altogether failure and ineptness of anti-trust laws in a genuine market economy,[13] the *Noerr-Pennington* doctrine provides more insight as to the schizophrenic nature of the law when the artificial categories of commercial and non-commercial speech are applied in their running afoul of antitrust law.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), this Court immunized joint efforts by 24 railroads and an association of railroad presidents to obtain legislation and executive action unfavorable to competing trucking firms. This Court emphasized that condemning the railroad's lobbying campaign "would impute to the Sherman Act a purpose which would have no basis whatever in the legislative history of the Act." Of course, realistically any finding of Sherman Act liability would have raised important constitutional questions considering the right to petition under the First Amendment. Yet, the so-called fundamental freedom of expression by the railroads was engaged in for the sole purpose of eliminating competition from trucks and for purely "commercial" benefit (which, ironically, once achieved, would have been relegated to some lower level of

[13] *See generally*, Domenick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (1982).

scrutiny in any subsequent commercial-transfer communication). Of course, the *Noerr-Pennington* "sham" exception attempts to treat symptoms of this jurisprudential schizophrenia but even this Court said the boundary between legitimate petitioning and sham behavior might prove to be "a difficult line to discern and draw." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Further symptoms of this schizophrenia can easily be found in area of campaign finance reform, also.[14]

And, as Justice Stevens wrote in his concurring opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 579-80 (1980), "Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of the speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."

And so too can commercial means achieve political ends. Suppose someone like Mr. Ted Turner, as he has done, forms a "commercial" cable television network and generates huge profits, $1 billion of which he gives to the

[14] Leaving alone for the purpose of this brief the fact that no enumerated power exists in the federal Constitution to regulate campaigns (and very little authority exists to regulate elections), campaign reform cases can also be an expected outcome of schizophrenic free speech precedent. The artificial bifurcation of speech into commercial and political categories will further muddle the issue as to whether money spent on campaign issue ads is political or commercial speech while proprietary newspaper corporations corner the market on campaign-related speech free of campaign finance restrictions.

United Nations for the purpose of helping women, children, and victims of war in poor countries. Now, too, we have the pursuit of "commercial" speech (presumably) for what are arguably political ends. Another case in point, how might this Court classify the speech of the advertiser selling printing presses to political campaigns?

Given that any chain is only as strong as its weakest link, it makes little sense to classify and grant different levels of judicial protection to *means* "links" and *ends* "links" in the same "chain," when each link is dependent upon the protection and strength of the other. A "chain" constructed for the purpose of achieving political ends necessarily depends upon the strength of at least some "commercial" links.

III. EVEN IF THE COURT COULD APPLY THESE ARTIFICIAL STANDARDS, ECONOMIC DISCOURSE IS PROTECTED.

Nike responded to the media campaign against it by addressing questions of ethics and economic policy relating to whether domestic companies should be responsible for working conditions in factories located in other countries and the effects of economic globalization generally. This Court's cases "have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a non-exhaustive list of labels – is not entitled to full First Amendment protection." *Abood v. Detroit Board of Education*, 431 U.S. 209, at 231-232 n. 28 (1977). Certainly, this Court cannot now conclude that Nike's economic policy speech is "commercial" or, more

importantly, deceptive and misleading given that "[e]conomics is the only field in which two people can share a Nobel Prize for saying opposing things."[15]

Nike, like every other company, including the corporate producers of the television series "20/20" and "48 Hours," operate to produce products for their customers and profits for their owners, in this case their public shareholders. In so doing, they seek to minimize costs and maximize revenue, as they turn out products demanded in the marketplace. Nike has therefore elected to employ lower cost contract workers in emerging markets, such as Asia and Latin America.

In moving much of its production to lower-cost regions, the company has joined many other businesses, including electronics, semiconductor, and computer manufacturers, as well as software producers and others. These firms employ literally millions of workers who are each individually convinced that they work in jobs offering better compensation packages than any available alternatives.

Given that economists share Nobel prizes for opposing theories, it is not surprising to learn that one can, at the same time, find a long line of "economic virtuosos who think that when an employer and an employee agree to exchange work for wages, the latter is somehow 'exploited' by the former."[16] According to *these* "virtuosos":

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[15] Attributed to Roberto Alazar (specifically, Myrdahl and Hayek shared one).

[16] William Stepp, *Nike is Right*, March 15, 2001, *available at* http://www. mises.org/fullstory.asp?control=628.

> [a] worker accepting a job with a Nike contractor continues to demonstrate how 'exploited' he is by showing up for work every day, and by accepting a paycheck based on mutually-agreed-upon terms. Anyone whose labor is worth less than the government-prescribed minimum is to be consigned to unemployment through no fault of his own; and any business wanting to hire such people must find costlier alternatives. According to this school, a "sweatshop" is a factory where the owners and their employees have the effrontery to agree to employment terms other than those approved by the "sweatshop's" critics.[17]

IV. PUBLIC POLICY DICTATES A RULING IN NIKE'S FAVOR.

A. Disparate Levels of Scrutiny Constitute an Equal Protection Violation.

To the extent two similarly-situated, profit-making ventures are subject to differing levels of government protection, constitutional equal protection may be violated. Differing degrees of First Amendment protection for that which television networks broadcast on their network "news" programming to sell advertising and that which Nike releases to maintain its reputation and, as argued by Kasky, sell sporting apparel, may very well constitute an equal protection violation.

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[17] *Id.*

B. Nike Should Not Be Penalized Domestically For Improving the Social and Economic Welfare of Citizens Residing in Foreign Countries.

Economic principles and history teach that economies do not move from the simple agrarian stage to an advanced industrialized stage overnight or without intermediate stages. Similarly, labor standards do not directly advance from 80 hour weeks spent behind the horse and plow for subsistence wages to thirty hour weeks in air conditioned offices in exchange for salaries capable of purchasing the latest plasma screen television technology. One significant limiting factor in the transition from one stage to the other in what economists define as "developing countries" is the lack of capital accumulation. Companies like Nike, by bringing capital into these countries, speed the progression from one level of production to another but cannot possibly transcend every intermediate stage of production instantaneously.

Moreover, in the real world, when two parties enter into exchanges, they do so because they expect to benefit from the exchange. "The contract workers Nike employs are free to terminate their employment whenever they wish, if they prefer either another job, self-employment, or leisure. To the extent they do not, one can only assume the alternatives, in whatever the level of advancement in that developing country, are necessarily worse."[18]

[18] *Id.*

C. Absent Protecting Speech, Corporations May Be Placed In An Impossible Position

As a consequence of this Court not allowing Nike and others to respond freely to critics, a corporation may find itself a short step away from the most undesirable position of having to choose between lawsuits such as this one or ignoring critics of its managerial and foreign trade practices and suffering instead a shareholder suit alleging negligence for the drop in stock values resulting from its failure to defend itself in the court of public opinion.

V. CONCLUSION

Until this Court completely and emphatically overturns that which it begun to overturn upon the immediate reflection of *Valentine*, only more confusion, more impossible-to-apply standards, and more vague laws will result. This Court's artificial characterization of commercial speech as outside the full protection of the First Amendment, much as the corollary artificial distinction between economic and so-called fundamental liberties, (*i.e.*, freedom of the press is meaningless without property rights in ink), will necessarily result in an erosion of so-called political freedoms, as well.

Respectfully submitted,

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